ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	ET Docket No. 97-99
Amendment of the Commission's Rules	)	
To Relocate the Digital Electronic Message	)	
Service From the 18 GHz Band to the	)	
24 GHz Band and To Allocate the	)	DOCKET FILE COPY ORIGINAL
24 GHz Band for Fixed Service	)	

APPLICATION FOR REVIEW OF THE MILLIMETER WAVE CARRIER ASSOCIATION, INC.

MILLIMETER WAVE CARRIER ASSOCIATION, INC.

Richard E. Wiley
R. Michael Senkowski
Eric W. DeSilva
of
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20554
(202) 429-7000

Its Attorneys

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SUMMARY

The Millimeter Wave Carrier Association, Inc. ("MWCA") hereby requests full Commission review of the *Licensing Order* released June 24, 1997, modifying the licenses of incumbent licensees in the Digital Electronic Message Service ("DEMS"). By implementing modifications to the DEMS rules issued in the March 14, 1997, *DEMS Relocation Order* without notice and comment procedures, the *Licensing Order* perpetuates unlawful actions and therefore should be voided. Given the grave legal questions raised regarding the extension of the national security exemption in the *DEMS Relocation Order*, and the lack of any legal support for that action, the *Licensing Order* should not have been issued prior to issuance of a reconsideration order on the merits.

The Commission's *DEMS Relocation Order*, issued without notice and comment procedures, was challenged in no less than four petitions for reconsideration. In addition, one entity explicitly requested the Commission not to move forward with granting the contemplated license modifications until after review of the *DEMS Relocation Order*. Without acknowledging this plea, and barely even acknowledging the petitions for reconsideration, the *Licensing Order* was nonetheless issued before the pleading cycles on the petitions for reconsideration were even complete.

The Commission's modification of the DEMS allocation and rules in the *DEMS Relocation Order* is legally indefensible. In the principal case upholding the Commission's use of national security exemption, the Commission did not, as Teligent alleges, allocate replacement spectrum for displaced licensees without notice and comment. In the orders leading to the *Bendix* appeal, which Teligent characterizes as "the *only* applicable national security precedent,"

the Commission in fact allocated replacement spectrum for licensees that were displaced due to military requirements only after a notice and comment proceeding under the APA. The procedures followed in *Bendix* are precisely the procedures MWCA has urged the Commission to follow in the present case.

Given the legal infirmities of the *DEMS Relocation Order*, the *Licensing Order* should not have been issued. The license modifications implemented in the *Licensing Order* were predicated on a prior unlawful action by the Commission. Because the notice and comment defects of the *DEMS Relocation Order* cannot be cured upon reconsideration, it is fundamentally unsound policy to permit Teligent to begin utilizing the 24 GHz band.

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THE MILLIMETER WAVE CARRIER ASSOCIATION, INC.

The Millimeter Wave Carrier Association, Inc. ("MWCA"), by its attorneys, hereby requests full Commission review of the Order in the above-captioned proceeding issued on June 24, 1997, by the Chief, Public Safety and Private Wireless Division.[1] The *Licensing Order* implements changes adopted, without notice and comment procedures, in the Commission's March 14, 1997, *DEMS Relocation Order* that are still subject to petitions for reconsideration.[2]

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[1] Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service from the 18 GHz Band to the 24 GHz band and to Allocate the 24 GHz Band for Fixed Service, DA 97-1285 (June 24, 1997) ("*Licensing Order*").

[2] *See* Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service from the 18 GHz Band to the 24 GHz band and to Allocate the 24 GHz Band for Fixed Service, 12 FCC Rcd 3471 (1997) ("*DEMS Relocation Order*"); *see also,* Petition for Reconsideration of BellSouth Corporation, ET Docket No. 97-99 (filed June 5, 1997); Petition for Reconsideration of DirecTV Enterprises, Inc., ET Docket No. 97-99 (filed June 5, 1997); Petition for Partial Reconsideration of the Millimeter Wave Carrier Association, Inc., ET Docket No. 97-99 (filed June 5, 1997) ("MWCA Petition"); Petition for Reconsideration of WebCel Communications, Inc., ET Docket No. 97-99 (filed June 5, 1997); Petition for Clarification of WinStar Communications, Inc., ET Docket No. 97-99 (filed June 5, 1997); Joint Opposition to Petitions for Reconsideration, Partial Reconsideration, and Clarification of Digital Services Corporation,

(Continued...)

Because the *Licensing Order* perpetuates unlawful actions taken in the *DEMS Relocation Order*, it should be summarily reversed.

I. STANDING

As a trade association representing the interests of companies providing millimeter wave services, MWCA has standing to petition for review of the *Licensing Order*. An organization has associational standing if "its members would otherwise have standing to sue in their own right," "the interests it seeks to protect are germane to the organization's purpose," and "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[3] MWCA's interest in overturning the Commission's rules regarding DEMS is germane to its organizational purpose, as stated in its certificate of incorporation, "to provide a forum for advancing the business interests of communications carriers utilizing millimeter wave radio spectrum (spectrum above 20 GHz) before regulatory bodies . . . including, but not limited to, spectrum allocation matters . . . and regulatory oversight." Manifestly, the claim made and the relief requested—respectively a broad facial challenge to the *Licensing Order* and review thereof—do not require the participation of individual members. Indeed, by pursuing relief through MWCA, duplicative filings are minimized, thus providing significant judicial economies.

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Microwave Services, Inc., and Teligent, L.L.C., ET Docket No. 97-99 (filed July 8, 1997) ("Teligent Opposition"); Consolidated Opposition of Teledesic Corporation to Petitions for Reconsideration, ET Docket No. 97-99 (filed July 8, 1997) ("Teledesic Opposition").

[3] *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

MWCA also satisfies the first requirement of the "associational standing" test because its members would otherwise have standing to seek Commission review in their own right. A member has standing to seek relief if it could demonstrate "actual or imminent" "injury-in-fact" that is "fairly traceable" to the challenged decision and "likely" to be "redressed by a favorable decision."[4] The *Licensing Order* grants a *de facto* DEMS monopoly to a single entity in virtually all major markets in the United States. Had this spectrum been subject to auction procedures, MWCA's members would have bid for the valuable rights contemplated by the "new" DEMS licenses. Their inability to file applications to compete in providing DEMS constitutes actual economic injury sufficient to establish "injury-in-fact."[5]

Moreover, MWCA members are competitors of Teligent, and Commission actions that increase the spectrum available to a competitor also establish "injury-in-fact."[6] These injuries are clearly traceable to the *Licensing Order*, and they are redressible by the Commission on reconsideration. Finally, the interest MWCA seeks to protect here, FCC compliance with the notice and comment provisions in the APA,[7] clearly falls within "the zone of interests" protected

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[4] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570-72 (1992).

[5] *See, e.g., Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1315-16 (1995) (holding that cellular service providers' inability to file applications to compete for larger, more profitable areas due to a change in FCC rules constitutes actual economic injury sufficient to establish "injury-in-fact"); *FCC v. Sanders Bros. Radio Station,* 309 U.S. 470, 477 (one "likely to be financially injured" by agency action has standing to challenge that action).

[6] *See, e.g., Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 397, 403 & n.13 (1987) (recognizing that alteration of competitive conditions has probable economic impact which satisfies the "injury-in-fact" test).

[7] 5 U.S.C. § 553.

by that Act.[8] Accordingly, MWCA has associational standing to petition the Commission to reconsider the *DEMS Relocation Order.*[9]

II. INTRODUCTION AND BACKGROUND

The June 23, 1997, *Licensing Order* modifies the authorizations of DEMS incumbents pursuant to rule modifications adopted by the Commission in the *DEMS Relocation Order*. The *DEMS Relocation Order*, issued under the national security exemption to the APA without prior notice and comment, terminated the DEMS operations in the 18 GHz band to protect military satellite systems and allocated spectrum, and adopted transition rules, to move 18 GHz DEMS incumbents to the 24 GHz band. While incumbent licensees were provided with a 30 day period to file protests under Section 316, other interested parties were not permitted to contest the license modifications prior to the issuance of the *Licensing Order*.

The *DEMS Relocation Order* was subject to five petitions for reconsideration or clarification, including a petition for partial reconsideration by MWCA. These petitions largely argued that the allocation of replacement 24 GHz spectrum and the adoption of transition rules was patently unlawful under the national security exemption. One petitioner, WebCel, also filed a letter urging the Commission to "maintain the *status quo* by deferring issuance of any DEMS

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[8] *See, e.g., Independent Guard Ass'n of Nevada v. O'Leary*, 57 F.3d 766 (9th Cir. 1995) (discussing notice and comment provisions of the APA).

[9] *See, e.g., Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309 (1995) (holding that *potential* applicants had standing to contest a rulemaking action by the FCC).

license modifications until a thorough reconsideration has been completed."[10] Notwithstanding the serious legal issues raised in the petitions for reconsideration and WebCel's request, the *Licensing Order* now allows incumbents to begin deploying facilities in the 24 GHz band.

The controversies surrounding the DEMS allocation follow an intricate path. The allocation was originally established in 1984, providing 10 paired channels at 18.82-18.92/19.16-19.26 GHz ("18 GHz band") for high-power point-to-multipoint operations.[11] These channels were further divided into 5 channels for private operation and 5 channels for common carrier operation. Due to the paucity of DEMS channels available, the Commission implemented stringent one-per-market rules from the inception of the 18 GHz service.

Beginning around 1993, Teligent and several affiliates began acquiring DEMS licenses in the largest markets of the country. Despite the restrictive conditions on ownership of multiple DEMS channels in a market, Teligent ultimately succeeded in obtaining—in many cases—all five common carrier DEMS authorizations for major cities across the country. Teligent's progress was halted when DEMS licensing was frozen by the Commission in August of 1996 due to potential interference concerns relating to a satellite proposal by Teledesic overlapping the 18 GHz band.[12]

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[10] Letter from Glenn B. Manishin, Counsel for WebCel Communications, Inc. to Hon. Reed E. Hundt, Chairman, Federal Communications Commission, dated April 23, 1997.

[11] *Digital Termination Systems*, 56 Rad. Reg. 2d (P & F) 1171 (1984).

[12] Freeze on the Filing of Applications for New Licenses, Amendments, and Modifications in the 18.8-19.3 GHz Frequency Band, DA 96-1481 (Aug. 30, 1996).

Notwithstanding the apparently restricted nature of the then-ongoing Teligent application proceedings, correspondence dated in early December, 1996, from Teledesic to the Commission suggests the potential use of 24 GHz as "replacement" spectrum for 18 GHz DEMS systems.[13] Following one month after that private communication, on January 7, 1997, the National Telecommunications and Information Administration ("NTIA") forwarded a letter to the Commission urging reallocation of DEMS providers to avoid potential interference to two earth stations the Department of Defense intended to deploy in Washington, D.C. and Denver, Colorado.[14] To facilitate this relocation, NTIA offered to transition Government operations out of 24.25-24.45/25.05-25.25 GHz ("24 GHz band").

The Commission could have simply continued the freeze at 18 GHz and adopted interim rules to ensure the interference-free operations of military systems in the 18 GHz band. Specifically, consistent with the military exemption to the APA, the FCC could have:

- Replaced the existing interim coordination procedures with permanent coordination requirements as specified by the NTIA;
- Modified the Part 101 rules to prohibit any new low power outdoor operations within 55 km (or any new low power indoor operations within 20 km) of a specified latitude and longitude intended to protect earth stations in Washington, D.C. and Denver, Colorado;
- Required all 18 GHz DEMS licensees in the Washington, D.C. and Denver, Colorado areas to cease operation immediately; and,

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[13] *See, e.g.*, Letter from Mark Sturza to Russ Daggatt dated December 5, 1996, filed in ET Docket No. 97-99 as attachment to "Document #1" (dated Dec. 6, 1996).

[14] Letter from Richard Parlow, Associate Administrator, Office of Spectrum Management, NTIA, to Richard Smith, Chief, Office of Engineering and Technology, FCC, dated January 7, 1997; Letter from Richard Parlow, Associate Administrator, Office of Spectrum Management, NTIA, to Richard Smith, Chief, Office of Engineering and Technology, FCC, dated March 5, 1997.

- Required all 18 GHz DEMS licensees outside the Washington, D.C. and Denver, Colorado areas to cease operation no later than January 1, 2001.

Arguably, all of these steps were necessary to protect military space systems in the 18 GHz band and, notwithstanding any public debate, were compelled by national security exigency.

The *Order*, however, appends a lengthy list of additional, severable decisions to the measures needed to protect national security operations. Specifically, the *Order*:

- Allocated the 24 GHz band for Fixed Service use;
- Determined that DEMS was incapable of existing as a service without nationwide uniformity in allocation;
- Determined that achieving "equivalency" in the 24 GHz band for incumbent 18 GHz providers requires granting those incumbents four times as much spectrum in the new band;
- Adopted a channel plan for the newly allocated 24 GHz Fixed Service halving the number of DEMS channels band by providing only 5 pairs of 40 MHz channels (*i.e.*, each channel pair comprising a total of 80 MHz of spectrum), thereby effectively granting a virtual DEMS monopoly to Associated and its affiliates;
- Indicated it would modify the authorizations of 18 GHz DEMS licensees in the Washington, D.C. area to provide such licensees with new DEMS frequencies in the newly allocated 24 GHz Fixed Service band after January 1, 1998;
- Indicated it would modify the authorizations of 18 GHz DEMS licensees in the Newark, New Jersey area to provide such licensees with new DEMS frequencies in the newly allocated 24 GHz Fixed Service band after January 1, 2000;
- Indicated it would modify the authorizations of 18 GHz DEMS licensees outside the Washington, D.C. and Newark, New Jersey areas to provide such licensees with new DEMS frequencies in the newly allocated 24 GHz Fixed Service band;
- Dismissed pending DEMS applications that had not passed the 60 day cut-off period for competing applications by the time of the 18 GHz licensing freeze; and,
- Indicated that the Commission will soon initiate a licensing proceeding to develop regulations for issuance of new licenses in the 24 GHz band.

Notwithstanding the broad scope of these changes—including one of the largest new spectrum allocations in recent times—these rule alterations were made without the benefit of notice and comment procedures under the APA.

The Commission's 4:1 spectrum equivalency ratio adopted in the *DEMS Relocation Order* is particularly troubling. The ratio was originally based on a single page "technical" analysis. Two and one-half months after the *DEMS Relocation Order* was issued, and only two days before the petitions for reconsideration of that order were due, the record in the proceeding was "supplemented" by the FCC with a number of written communications from Teligent and Teledesic relative to the 24 GHz band.[15] These documents provide compelling evidence that a private, "off-the-record" proceeding was conducted prior to the assertion of national security as a basis to inhibit broad public participation.[16]

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[15] *See* Memorandum from Chris Murphy to William Caton, ET Docket No. 97-99 (filed June 3, 1997). Because the public did not have access to this material in time to influence the Commission's decision in the *DEMS Relocation Order*, these *ex post facto* submissions are irrelevant and cannot be construed as a public record that legally justifies the actions taken in the order.

[16] No *ex parte* notifications were filed for the supplemental materials at the time the materials were originally submitted to the FCC. The nondisclosure of these materials is particularly disturbing where, as here, it appears the materials are directly relevant to resolution of a series of contested license modifications and the resolution of a petition for revocation by Teledesic against Teligent. *See* Consolidated Petition to Deny and Petition to Determine Status of Licenses of Teledesic Corporation, File Nos. 9607682 *et al.* (Sept. 6, 1996). Under Section 1.1208 of the Commission's rules, contested adjudicatory proceedings are deemed restricted and no *ex parte* contacts are permitted even if disclosed on the record. In fact, the Commission noted recently that restricted matters were implicated by the rulemaking, and it felt compelled to release a notice explicitly applying the "non-restricted" status to the rulemaking. *See* Commission Applies "Permit But Disclose" *Ex Parte* Rules to Proceedings Related to Relocation of the 18 GHz DEMS Licensees to 24 GHz Band, FCC Public Notice, DA 97-1282 (June 19, 1997). Despite that the order required parties to file notifications for any prior communications on these matters, *see id. at* 2, no notifications have been filed concerning the documents placed into the record on

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MWCA is seeking review of the *Licensing Order* because it perpetuates unlawful actions taken in the *DEMS Relocation Order*. Despite the seriousness of the charges in the petitions for reconsideration, by the *Licensing Order*, Teligent is free to reap significant private gains at the public's expense. Having bypassed public processes in a patently unlawful manner to obtain a *de facto* DEMS monopoly in the largest markets, Teligent should not be permitted to compound its ill-gotten gains by entering the market before its competitors and before substantive legal review of the *DEMS Relocation Order*. For this reason, MWCA is simultaneously filing a motion for expedited review in this docket urging the Commission to proceed with all due haste in reconsidering the *DEMS Relocation Order* and in reviewing the *Licensing Order*.

III. THE *LICENSING ORDER* PERPETUATES UNLAWFUL ACTIONS TAKEN IN THE *DEMS RELOCATION ORDER* TO ALLOCATE REPLACEMENT SPECTRUM UNDER THE NATIONAL SECURITY EXEMPTION TO APA

The APA provides the ground rules for agency actions by guaranteeing due process and by ensuring fundamental fairness. The linchpin of the APA rulemaking provisions is the notice and comment requirement for proposed rules. Without notice, affected parties cannot prepare for, or argue against, rules with the full force of federal law that impact their fundamental rights. Without informed comment, there is no opportunity for interested parties to air different perspectives and offer data that is usually required for expert agencies to render informed and

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June 3, 1997, or for any other communications that may have occurred, including the oral *ex partes* referenced in the subject documents. *See, e.g.*, Letter from Rajendra Singh to Steve Sharkey, filed in ET Docket No. 97-99 as "Document #6" (dated January 14, 1997) (stating "[i]n our meeting on January 13, 1997"). No claim for a national security "exemption" to the *ex parte* rules has been advanced, nor could such a claim be made.

balanced decisions.[17] Without allowing interested parties to offer new ideas and publicly debate policy, there is no opportunity to reap the benefits of the adversarial process, whereby opinions are probed, facts examined, and truth exposed. Without the adversarial process and public spirited debate, there is no record upon which the expert agency may make reasoned judgments in the public interest. And, without reasoned decisionmaking on the record, there is no legitimacy to administrative action.

For these reasons, Section 553 of the APA requires that an agency provide "[g]eneral notice of proposed rule making," including "the terms or substance of the proposed rule or a description of the subjects and issues involved."[18] The APA also requires that, "[a]fter notice required by this section, the agency *shall* give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments."[19] Only two limited exceptions to these procedures are recognized, "to the extent there is involved . . . a military or foreign affairs function of the United States," and for certain rules involving internal agency management. For the reasons discussed above, however, courts have held that these APA exemptions are to be "narrowly construed and only reluctantly countenanced."[20]

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[17] *See, e.g., Batterston v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980) (stating purpose of APA notice and comment provisions: "to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to nonrepresentative agencies," and to "assure[] that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions.").

[18] 5 U.S.C. § 553(b).

[19] 5 U.S.C. § 553(c) (emphasis added).

[20] *American Federation of Government Emp., AFL-CIO v. Block*, 655 F.2d 1153 (D.C. Cir. 1981); *New Jersey v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980).

Under applicable precedent, the *DEMS Relocation Order*'s expansive use of the "military" exemption to the APA's notice and comment requirements is patently impermissible. The Commission, while taking a few actions legitimately necessary to national security, has improvidently linked those actions with a broad range of far-reaching policy and spectrum allocation decisions that are entirely severable, unnecessary to the military functions of the agency, and contrary to the public interest. If the agency and courts were to countenance a blanket exemption from the APA merely because some aspects of an order touch on military interests, the exception would swallow the rule. Courts, however, have not permitted the national security exemption to cannibalize the APA.[21]

Independent Guard Ass'n of Nevada v. O'Leary ("Independent Guard")[22] and *Bendix Aviation Corporation v. FCC* ("*Bendix*")[23] are the leading cases on the national security exemption. *Bendix*, in particular, is squarely on point—even Teligent characterizes *Bendix* as "the *only* applicable national security precedent."[24] In that case, the Commission was upheld in utilizing the national security exemption to reallocate the 8.5-9.0 GHz band from radionavigation use to military use without notice and comment. In *Bendix*, however, the Commission followed

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[21] The *Order* also appears to invoke the "good cause" provision of Section 553(b)(3)(B). *Order* at ¶ 18. The reliance on "national security," however, is entirely circular and wholly illegitimate with respect to the 24 GHz decisions in the *Order*. Thus, nowhere does the *Order* make any "showing" of the good cause rendering notice and comment "unnecessary" or why notice and comment is contrary to the public interest when developing rules for DEMS at 24 GHz.

[22] 57 F.3d 766 (9th Cir. 1995).

[23] 272 F.2d 533, 541 (D.C. Cir. 1959), *cert. denied sub nom. Aeronautical Radio, Inc. v. United States*, 361 U.S. 965 (1960).

[24] Teligent Opposition at 11 (emphasis added).

the procedures it should have followed in this case—it allocated replacement 13 GHz spectrum for displaced radiolocation users *only after conducting a separate notice-and-comment rulemaking proceeding.*

Teligent's sole argument defending the use of the national security exemption is a thorough mischaracterization of *Bendix*. Teligent states that the FCC "relocate[d] DEMS in exactly the same manner as it had relocated the radionavigation service to [13 GHz] . . . in *Bendix*." Similarly, Teligent also states that, in *Bendix*, "the Commission—without providing for public notice and comment—made available the [13 GHz] . . . band as replacement spectrum for the displaced licensees."[25] As shown by the documents attached as Exhibits A-D of the MWCA Reply, however, Teligent is simply incorrect. In *Bendix*, the Commission allocated replacement spectrum in a separate docket from the proceeding on appeal, which is precisely what MWCA is arguing the Commission was required to do in order to allocate 24 GHz spectrum in the present case.

Independent Guard is the leading case defining the limits of agencies' use of the national security exemption. There, the Department of Energy ("DoE") invoked the exemption in prescribing, without notice and comment, supplementary personnel management requirements applied to DoE personnel as well as independent contractors guarding nuclear weapons. While the *Independent Guard* court held that DoE was performing a "military function," the court reversed the agency because it concluded that the exemption was available only "to the extent" of that function and an insufficient nexus existed between DoE's military function and civilian

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[25] *Id.* at 12.

guards protecting nuclear weapons.[26] Specifically, the court found that the term "military function" has measurable contours and stated "[t]he statute's text strongly suggests that those contours are defined by the specific function being regulated."[27]

Under the present facts, it is arguable that the FCC performs a military function in assuring the interference-free operation of military systems in the 18 GHz band. This provides what may be a sound basis for invoking the military exemption to require DEMS incumbents immediately to cease operations in Washington, D.C., and Denver, Colorado, where military earth stations are to be located and, in the future, to cease all operations in the 18 GHz band as the military deploys additional facilities. These specific decisions are dictated by the military's needs and only one outcome is possible, thus rendering public debate superfluous. Once interference-free operation of 18 GHz military systems is assured, however, the "extent of" the FCC's military function ends and, along with it, the ability to use the national security exemption to the APA.

There is no basis for the *DEMS Relocation Order* to assert that decisions relating to the new Fixed Service allocation at 24 GHz should not be subject to notice and comment procedures.[28] As stated in the *Independent Guard* case: "the exceptions apply only 'to the extent'

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[26] *Independent Guard*, 57 F.3d at 769.

[27] *Id.*

[28] In addition, the APA's rulemaking exceptions "are unavailable to the agency if the action substantially affects third parties." Stein, Mitchell & Mezines, *Administrative Law* (M. Bender Supp. Feb. 1997) at § 15.02[1]. In the present case, the *Order* makes available 400 MHz of previously government spectrum and sets up a transition mechanism whereby, because of the halving of the number of DEMS channels, a *de facto* monopoly is granted to a single company and its affiliates. This action clearly affects MWCA members' ability to enter the 24 GHz

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that the excepted subjects are directly involved"[29] and "[a] true and supported or supportable finding of necessity or emergency must be made and published." *Id.* at 200.[30] The actions taken in the *Order* with respect to the 24 GHz band are not "directly related" to the Commission's military functions. If DoE cannot invoke the exemption to develop rules for personnel at *military* facilities guarding *military* weapons, a nexus between the *Order*'s actions with respect to the 24 GHz band and the operations of military systems in the 18 GHz band is not even arguable. The fact that the FCC's determinations do not rely on military exigency is amply illustrated by the technical appendix purportedly justifying quadrupling the spectrum rights of incumbents; if the outcome of the *Order* were pre-ordained, no such exhibit would be necessary.

As the court noted in the *Independent Guards* case, a broad reading of the provision sweeps too expansively: "If . . . contractor support activities [are] held to be within the scope of the military function exception, . . . even window washers could find their undoubtedly necessary support tasks swept within the exception's ambit, and DOE regulations affecting their employment exempt from notice and comment." The court concluded "[n]either the statute, nor

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DEMS marketplace, as well as impacting their ability to compete for wireless local loop traffic in the millimeter wave bands. As courts have stated, "[t]he reading of the [Section] 553 exemptions that seems most consonant with Congress' purpose in adopting the APA is to construe them as an attempt to preserve agency flexibility in dealing *with limited situations where substantive rights are not at stake.*" *Amer. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987) (emphasis added).

[29] *Independent Guard*, 57 F.3d at 769 (*citing* S.Doc. No. 248, 79th Cong., 2d Sess. 199 (1946)) (emphasis added).

[30] [redacted]

common sense, requires such a result."[31] In the present case, if the military exemption were sufficient to shield any aspect of *any* order taking *any* action to protect military operations, the APA would be rendered superfluous. Any action, no matter how severable, could be appended to an order stating some military need and exempted from public proceedings. Courts have held, however, that they "will not allow a regulation otherwise subject to section 553 procedures to piggyback on regulations properly issued in response to a sudden exigency when to do so would result in that regulation's being 'chiseled into bureaucratic stone.'"[32]

MWCA further notes that there is no "exigency" or "emergency" requiring the FCC to act quickly without adequate rulemaking procedures. In most areas, in fact, the DEMS incumbents are not required to terminate 18 GHz operations until January 1, 2001. Moreover, the *DEMS Relocation Order* was not issued until three and one-half months after the use of the 24 GHz band was first suggested, and did not go into effect until five months after Teledesic's letter. That period could have been used to take public comment, rather than seeking only input from two interested parties. Given that there is no "supported or supportable finding of necessity or emergency" warranting preclusion of public participation, the use of the exemption is illegal.

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[31] *Id.*, 57 F.3d at 770.

[32] *U.S. v. L. J. Garner*, 767 F.2d 104, 120 (5th Cir. 1985) (*citing American Federation of Government Employees v. Block*, 655 F.2d 1153, 1157 (D.C. Cir. 1981) (regulations responding to much more than emergency must be promulgated through public procedures)).

IV. THE *LICENSING ORDER* FAILS TO CONSIDER IMPORTANT PUBLIC POLICY AND TECHNICAL ISSUES

Perhaps due to the lack of public proceedings on the issues implicated by the restructuring of DEMS, the *Licensing Order* fails to consider important public policy and technical issues and makes determinations that are manifestly contrary to the public interest. Indeed, without even any discussion, the *Licensing Order* reverses the Commission's long-standing policies favoring multiple entry and changes fundamental aspects of an allocation formalized in notice and comment rulemakings. As discussed below, these determinations are contrary to the public interest and should be reversed. At a minimum, these issues should be aired in an open public forum.

First, the *Licensing Order* implements the *DEMS Relocation Order*'s determination to halve the number of available DEMS channels. In the 18 GHz band, there were a total of ten DEMS channel pairs available for licensing. In the 24 GHz band, the Commission has allocated only a total of five DEMS channel pairs. No where is the halving of the number of channels noted, much less justified. Given the original concerns regarding the scarcity of channels when the 18 GHz DEMS band was allocated—ultimately leading to the adoption of a DEMS one-per-market rule—this monumental revision of the DEMS rule structure should not have been taken without compliance with APA requirements. This is even more true where, as here, the halving of the number of channels results in a *monopoly over all available 24 GHz DEMS spectrum by one company and its affiliates in nearly every major market in the country*. The practical effects of the *Licensing Order*'s conclusions directly conflict with long-standing FCC policies favoring multiple entry and the development of competition.

Second, the *Licensing Order* implements a 4:1 equivalency ratio for 18 GHz incumbents transitioning to new channels in the 24 GHz band. This ratio was originally justified by a one-page appendix to the *DEMS Relocation Order*, but, two days before the deadline for filing petitions for reconsideration, a substantial amount of additional material was suddenly filed in the docket. Even the artificially supplemented material, however, does not support the conclusions arrived at in the *DEMS Relocation Order.*[33] At a minimum, the supplemented materials indicate that reasonable engineering minds could differ on the effect of a move to 24 GHz and that the need for a 4:1 equivalency ratio is not self-evident.

Finally, the *Licensing Order*, like the *DEMS Relocation Order*, fails to question whether it should even consider "preserving" Teligent's "rights" in the band. Although not discussed explicitly, the *DEMS Relocation Order* implicitly determines that, for equitable reasons, the FCC should honor the terms of the licenses used in Teligent's proposed network. It is axiomatic, however, that all radio licenses are issued subject to the regulatory authority of the Commission. In a case where: (1) a licensee is operating subject to waivers that arguably change the fundamental character of an allocation; (2) the licensee was subject to charges of non-construction and lack of candor; (3) the licensed systems are not significantly built-out; (4) the waivers granted substantially extend prior waivers granted by the Commission; and, (5) the licensee retains a *de facto* monopoly in most major markets in the country, at the very least, the

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[33] MWCA Reply at 19-21.

Commission must weigh these factors against the public interest and the long-standing competitive entry and open competition policies that it is waiving.[34]

V. CONCLUSION

In sum, by circumventing public notice and comment through a private negotiated process, the *DEMS Relocation Order* incorrectly applied "equitable" principles to act in derogation of the public interest, failing to consider a litany of policy and technical issues surrounding the new 24 GHz allocation. The *DEMS Relocation Order* impermissibly relied on the mere invocation of the military exemption to shield from public scrutiny unrelated, severable actions by the Commission establishing a new radio service and granting the lion's share of the licenses in that new service to a single entity and its affiliates. Applicable precedent confirms that that action is patently unlawful. By implementing regulations adopted in that order, the

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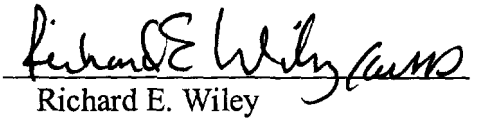
[34] *See generally* Consolidated Petition To Deny and Petition To Determine Status of Licenses, File Nos. 9607682 *et al.* (Sept. 6, 1997); Reply Brief in Support of Consolidated Petition To Deny and Petition To Determine Status of Licenses, File Nos. 9607682 *et al.* (Sept. 23, 1997).

Licensing Order is therefore also procedurally defective. The Commission must void its 24 GHz rules and initiate a rulemaking as required by the APA to examine, totally anew, the basis and purpose for a 24 GHz DEMS allocation.

Respectfully submitted,

MILLIMETER WAVE CARRIER
ASSOCIATION, INC.

By: 

Richard E. Wiley
R. Michael Senkowski
Eric W. DeSilva
of
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20554
(202) 429-7000

Its Attorneys

Dated: July 23, 1997

CERTIFICATE OF SERVICE

I, Bonita Walker, hereby certify that on this 23rd day of July, 1997, I caused copies of the foregoing "Millimeter Wave Carrier Association, Inc. Application for Review" to be served, by First Class Mail, postage pre-paid, on the following:

*Jeffrey H. Olsen
Robert P. Parker
Paul, Weiss, Rifkind, Wharton & Garrison
1615 L Street, N.W.
Washington, D.C. 20036-5694

*Jay L. Birnbaum
Antoinette Cook Bush
Anthony E. Varona
Jeffry A. Brueggerman
Skadden, Arps, Slate, Meagher & Flom, LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005

Laurence E. Harris
David S. Turetsky
Teligent, L.L.C.
11 Canal Center Plaza, Ste 300
Alexandria, Virginia 22314-1538

*Gary M. Epstein
John P. Janka
James H. Barker
Nandan M. Joshi
Latham & Watkins
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

*Glenn B. Manishin
Frank V. Paganelli
Stephanie A. Joyce
Blumenfeld & Cohen
Technology Law Group
1615 M Street, N.W., Ste 700
Washington, D.C. 20036

*Timothy R. Graham
Leo I. George
Joseph M. Sandri, Jr.
Barry J. Ohlson
WINStar Communications, Inc.
1146 19th Street, N.W.
Washington, D.C. 20036

*Mark A. Grannis
Kent D. Bressie
Gibson, Dunn & Crutcher, LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

Bonita Walker
Bonita Walker

* - Designates service by hand delivery.